

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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CLERK OF DISTRICT COURT
WESTERN DISTRICT OF TEXAS

LUIS POSADA-CARRILES,
Petitioner,

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v.

EP-06-CV-130-PRM

ALFREDO CAMPOS et al.,
Respondents.

SHOW CAUSE ORDER

On this day, the Court considered Petitioner Luis Posada-Carriles's "Petition for Writ of Habeas Corpus and Complaint for Declaratory Relief and Motion for Ruling to Show Cause," filed on April 6, 2006, the Magistrate Judge's "Report and Recommendation," filed on September 11, 2006, Respondents Alfredo Campos et al.'s "Objections to the Magistrate Judge's September 11, 2006 Report and Recommendation," filed on October 5, 2006, and all additional pleadings filed in the above-captioned cause. For the reasons stated below, the Court is of the opinion that Respondents should determine the applicability of 8 C F R § 241.14(c) before the Court proceeds in this cause.

In his petition, Petitioner asks the Court to determine that his continued post-removal order detention is no longer authorized by 8 U.S.C. § 1231. Specifically, Petitioner contends that his detention violates the Supreme Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Martinez v. Clark*, 543 U.S. 371 (2005). Under those decisions, an alien whose post-removal order detention period exceeds six months can be released from detention when "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. In his "Report and Recommendation," the Magistrate Judge recommended that the petition be granted. On October 5, 2006, Respondents filed timely objections to the

recommendation, requiring the Court to review the petition *de novo* *Warren v Miles*, 230 F.3d 688, 694 (5th Cir. 2000)

In their objections, Respondents also informed the Court that the Department of Homeland Security ("DHS"), through Immigrations and Customs Enforcement ("ICE"), had initiated review procedures under 8 C.F.R. §§ 241.13(e)(6) and 241.14. Resp'ts Objections 19 Those sections, in pertinent part, authorize the continued detention of an alien whose release will have "serious adverse foreign policy consequences," even when there is no significant likelihood of the alien's removal 8 C.F.R. § 241.14(c). Respondents also submitted to the Court a letter, titled "Interim Decision to Continue Detention" ("Interim Decision"), dated October 5, 2006 and informing Petitioner of this new development in his case. See Resp'ts Objections, Attach A

By initiating review proceedings under section 241.14, Respondents claim the authority to continue Petitioner's detention. Respondents rely on section 241.13(b)(2)(i), which provides that the government "shall continue in custody any alien for whom it has been determined that special circumstances exist and custody procedures under § 241.14 have been initiated." 8 C.F.R. § 241.13(b)(2)(i).¹

¹The Court is of the opinion that by invoking the authority of section 241.13, DHS concedes that Petitioner has met his initial burden under *Zadvydas*. The Interim Decision issued to Petitioner directly invokes section 241.13, indicating that "this interim decision has been made pursuant to 8 C.F.R. § 241.13(b)(2), (c) and (e)(6), pending a final determination regarding your current detention under 8 C.F.R. § 241.13." Addressing the scope of this section, 8 C.F.R. § 241.13(a) provides

This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future

Under section 241 14(c)(1), DHS

shall continue to detain a removable alien where the Attorney General or Deputy Attorney General has certified in writing that

- (i) Without regard to the grounds upon which the alien has been found inadmissible or removable, the alien is a person described in section 212(a)(3)(C) or section 237(a)(4)(C) of the Act,
- (ii) The alien's release is likely to have serious adverse foreign policy consequences for the United States, and
- (iii) No conditions of release can reasonably be expected to avoid those serious adverse foreign policy consequences

Id § 241 14(c)(1) Furthermore, this certification "shall be made only after consultation with the Department of State and upon the recommendation of the Secretary of State." *Id* § 241.14(c)(2).

Because DHS decided to initiate review proceedings under section 241 14 on October 5, 2006, the issue of this authority was not presented to and was not properly before the Magistrate Judge for his consideration. Nonetheless, this additional basis of continued detention must be evaluated as a response to the instant petition.

A court generally owes deference to the executive on matters of foreign affairs. *Jama v Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005). Furthermore, the Court notes that the Supreme Court specifically stated in *Zadvydas* that it was not then considering "terrorism or

This regulation, passed after the Supreme Court's decision in *Zadvydas*, adopts the Supreme Court's exact language. Under *Zadvydas*, the alien's burden is to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. By invoking this authority, DHS does not necessarily concede that Petitioner's release is warranted under *Zadvydas*. *Zadvydas* still gives Respondents an opportunity to rebut Petitioner's showing. *Id*. DHS's reliance on the authority of section 241 13 merely indicates that Petitioner has provided good reason, and thus his own *Zadvydas* burden has been satisfied.

The Court understands that, pursuant to section 241 13(e)(6), DHS is now simultaneously considering (1) whether to detain Petitioner under the authority of section 241 14 and (2) whether it agrees that Petitioner's release is otherwise warranted because there is no significant likelihood of Petitioner's release in the reasonably foreseeable future. See Respt's Objections, Attach A. 1 (stating that DHS is now undertaking "a final determination regarding [Petitioner's] current detention under 8 C.F.R. § 241 13").

other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security” *Zadvydas*, 533 U.S. at 696

The Court is additionally mindful of the complexity of this case, and Respondents’ need for additional time in which to evaluate the potential application of section 241 14(c). Furthermore, if DHS determines, after the required certification process is complete, that Petitioner’s continued detention is warranted under section 241 14, then it appears that the instant petition may be moot. Thus the Court believes that Respondents should be afforded an opportunity in which to seek such certification and, if appropriate, invoke the authority to continue Petitioner’s detention under section 241 14.

However, the Court also recognizes that Petitioner has now been detained for more than one year after the date his removal order became final. This is well beyond the six-month period recognized as presumptively reasonable in *Zadvydas*. Furthermore, Respondents only initiated review procedures under section 241 14 on October 5, 2006, the same day that Respondents were required to file objections to the Magistrate Judge’s recommendation.

The applicable regulations do not provide a time period in which review proceedings under section 241 14 must be completed. Petitioner argues that the delay requested by Respondents could amount to “unlawful detention for months, or even years, without the possibility of release.” Pet’s Reply to Resp’ts Objections 5. Respondents reject this charge as “premature and speculative,” but offer no timetable within which a determination will be made. Resp’ts Resp. to Pet’s Reply to Resp’ts Objections 6. For these reasons, the Court concludes that it is advisable to provide DHS with an opportunity to consider whether to apply the authority of section 241 14. The Court is of the opinion that the review proceeding may be adequately completed within a period of time not to

exceed ninety days. At that point, Respondents must provide the Court with information regarding any additional determinations made by DHS in this case. The Court anticipates that it will then address the merits of Petitioner's claims for relief.

Accordingly, **IT IS ORDERED** that Respondents' must **SHOW CAUSE** in writing by no later than **February 1, 2007** as to why relief should not be granted in this cause.

SIGNED this 2nd day of November, 2006



PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE